IN THE SUPREME COURT OF THE UNITED STATES

No. [redacted]

ARTHUR GOLDSTEIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

ROBERT A. CURRIN, ESQ.
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## INDEX


Page

OPINIONS BELOW ..... 1

JURISDICTION ..... 3

QUESTIONS PRESENTED ..... 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 4

STATEMENT OF THE CASE ..... 4

HOW FEDERAL QUESTIONS ARE RAISED ..... 7

REASONS FOR GRANTING THE WRIT:

I. The Commonwealth of Virginia Statute Section 18.1-228 is void for vagueness and overbreadth in violation of the First and Fourteenth Amendments to the Constitution of the United States ..... 8

II. The items charged against Petitioner are not obscene in the constitutional sense and should be provided protected expression under the First and Fourteenth Amendments to the Constitution of the United States as applicable at the time of the alleged sale ..... 17

III. The Due Process clause of the Constitution renders it necessary for the warrants to allege and the prosecution to adequately prove scienter in order to support a conviction ..... 21

IV. The State Court's utilization of a purely local contemporary community standard as opposed to a state-wide contemporary community standard violates Petitioner's rights under the First

and Fourteenth Amendments to the Constitution of the United States ..... 24
CONCLUSION ..... 28
CERTIFICATE OF SERVICE ..... 29
APPENDIX A ..... A.1
APPENDIX B ..... A.2
APPENDIX C ..... A.3
APPENDIX D ..... A.4
APPENDIX E ..... A.5

## TABLE OF CITATIONS

### Cases


Page

*Aday* v. *United States*, 375 F. 2d 855 ..... 20

*Bouie* v. *City of Columbia*, 378 U.S. 347 ..... 16

*California* v. *Pinkus*, 400 U.S. 922 ..... 20

*Cohen* v. *State*, Fla., 125 So. 2d 560 ..... 22

*Commonwealth* v. *Capri Enterprises, Inc.*, (Mass. Adv. Sh. 1974) ..... 10

*Commonwealth* v. *George C. Horton* (Mass. Adv. Sh. 1974) ..... 10

*Corinth Publications, Inc.*, v. *Wesberry* 146 S.E. 2d 764 ..... 20

*Essex Theatre Corporation* v. *Police Commissioner of Boston* (Mass. Adv. Sh. 1974) ..... 10

*In Re Giannini*, 69 Cal. 2d 563 ..... 26

*Ginzburg* v. *United States*, 383 U.S. 463 ..... 21

*Griswold* v. *Connecticut*, 381 U.S. 479 ..... 18, 19

*Grove Press* v. *Gerstein*, 278 U.S. 577 ..... 20

*Gulf States Theatres of Louisiana, et al* v. *Richardson, et al*, Sup. Ct. of La. No. 54,044 ..... 10

*Kaplan* v. *State of California*, 413 U.S. 115 ..... 9, 25

*Lanzetta* v. *New Jersey*, 306 U.S. 451 ..... 16

*Memoirs* v. *Massachusetts*, 383 U.S. 413 ..... 10, 20

*Miller* v. *California*, 413 U.S. 15 ..... 3, 9, 10, 11, 13, 14, 15, 16, 25, 27, 28

*Mohney* v. *State*, 300 N.E. 2d 66 ..... 10
*Paris Adult Theatre I, et al* v. *Slaton*, 413 U.S. 49 ..... 9
*People* v. *Douglas*, 209 N.Y.S. 2d 734 ..... 23
*Pinkus* v. *Pitchess*, 429 F. 2d 416 ..... 20
*Price* v. *Commonwealth*, 201 S.E. 2d 798 ..... 27, 28
*Rabe* v. *Washington*, 405 U.S. 313 ..... 16
*Redrup* v. *New York*, 386 U.S. 767 ..... 19
*Roth* v. *United States*, 354 U.S. 476 ..... 10, 13, 17
*Smith* v. *People of the State of California*, 361 U.S. 147 ..... 22, 24
*Stanley* v. *Georgia*, 394 U.S. 557 ..... 13, 17, 18
*State* v. *J. R. Distributors, Inc.*, 512 P. 2d 1049 ..... 27
*State* v. *Oman*, 121 N.W. 2d 616 ..... 22
*Stroud* v. *State*, 300 N.E. 2d 100 ..... 10
*United States* v. *Harriss*, 347 U.S. 612 ..... 16
*United States* v. *Irvine Lethe*, 312 F. Supp. 421 ..... 18
*United States* v. *Luros*, 253 F. Supp. 160 ..... 21
*United States* v. *Orito*, 413 U.S. 139 ..... 9
*United States* v. *Various Articles of Obscene Merchandise*, (Schedule No. 495) ..... 19
*United States* v. *12-200 Ft. Reels of Super 8mm Film, et al*, 413 U.S. 123 ..... 9

**Constitutional and Statutory Provisions**

United States Constitution

Amendment One..... 3, 4, 5, 8, 10, 13, 17, 19, 25

Amendment Four..... 4, 8

Amendment Five..... 4, 8

Amendment Six..... 4

Amendment Fourteen..... 3, 4, 8, 16, 17, 25

Statutes

Title 28 U.S.C.A. 1257..... 3

Code of Virginia, as Amended

Section 18.1-227 et seq..... 4

Section 18.1-228 et seq..... 3, 8, 14, 24, 28

In The

# Supreme Court of the United States

October Term, 1973

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No. _____

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ARTHUR GOLDSTEIN,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Arthur Goldstein, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia, entered in this case on the 4th day of March, 1974.

## OPINIONS BELOW

Defendant, Arthur Goldstein, was arrested and charged on December 9, 1970 upon a Warrant issued by Justice of the Peace B.L. Smithwick on December 9,

1970 and tried on January 18, 1971 by His Honor, Judge Llewellyn S. Richardson, in the Municipal Court of the City of Norfolk, Part I, wherein he was adjudged guilty and sentenced to three months confinement and fined $1,000.00. On Appeal, he was tried by His Honor, Judge William M. Guerry, sitting with a Jury in the Corporation Court of the City of Norfolk, Virginia on May 28, June 1 and 2, 1971 and was on June 2, 1971 convicted and found guilty of selling obscene items as charged in the Warrant and sentenced him to pay a fine of $5,000.00.

At the conclusion of the trial the Defendant through his attorneys, moved the Court to set aside the verdict of the Jury as being contrary to the law and the evidence which was denied and exceptions duly noted.

Notice of Appeal to the Supreme Court of Virginia and Assignment of Errors were timely filed.

On July 11, 1972, the Supreme Court of Virginia affirmed the Judgment of the Corporation Court of the City of Norfolk with an Order rejecting and refusing the Petition for Writ of Error and Supersedeas filed on Mr. Goldstein's behalf. That Order was entered on July 11, 1972 and is attached hereto as Appendix "B".

The United States Supreme Court on June 25, 1973, entered an Order vacating and remanding the Judgment in Goldstein v. Virginia, No. 72569.

On March 4, 1974 the Virginia Supreme Court ruled that it was of the opinion to adhere to its ruling rendered on July 11, 1972, and affirmed the Judgment rendered by the Circuit Court of the City of Norfolk, formerly the Corporation Court of the City of Norfolk. This Order of the Supreme Court of Virginia was entered on March 4, 1974, and is attached hereto as Appendix "C".

On the 27th day of March, 1974, the Supreme Court of Virginia stayed the execution and enforcement of the Judgment of March 4, 1974 until the 2nd day of June, 1974, (which happens to fall on a Sunday), pending action by the Petitioner to perfect his review by this Honorable Court and a continued stay until a final determination by the United States Supreme Court.

This Order of the Supreme Court of Virginia was entered on March 27, 1974, and is attached hereto as Appendix "D".

## JURISDICTION

The decision of the Supreme Court of Virginia was rendered on March 4, 1974. This Petition follows within 90 days thereof, Jurisdiction is invoked pursuant to 28 U.S.C., Section 1257 (3).

## QUESTIONS PRESENTED

1. Is the Commonwealth of Virginia obscenity statute, Section 18.1-228 of the Code of Virginia, 1950, as amended, void for vagueness and overbreadth in violation of Petitioner's rights under the *1st* and *14th Amendments* to the Constitution of the United States by virtue of this Court's decision in *Miller* v. *California, et als,* decided on the 21st day of June, 1973?

2. Are the items charged against Petitioner obscene in the constitutional sense and, therefore, not permitted protection under the law as it was applicable at the time of the sale?

3. Was it constitutionally necessary for the warrants to charge scienter and was there adequate affirmative proven evidence of scienter as is required by Due Process?

4. Does the State Court's utilization of a purely local contemporary community standard, as opposed to a state-wide contemporary community standard violate Petitioner's rights under the *1st* and *14th Amendments* to the Constitution of the United States?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *1st, 4th, 5th, 6th* and *14th Amendments* to the Constitution of the United States and the Code of Virginia, as amended, Section 18.1-227, et seq, are set forth as Appendix "E" hereto.

## STATEMENT OF THE CASE

On December 8, 1970, Sergeant Leonard M. Merritt, Norfolk, Virginia Police Department and Investigator for the Commonwealth Attorney's Office, acting on orders of the Commonwealth Attorney's Office entered the Henderson News Stand, 311 Granby Street, Norfolk, Virginia in order to purchase obscene material using his own discretion without knowing the definition of obscenity in the statute (T-92, Line 25, T-93, Line 17). Arthur Goldstein, Defendant, was the clerk in the store at that time. Sergeant Merritt purchased several publications, 1) "The Power of Love, Volume 2," C-1; 2) "The Power of Love, Volume 1," C-2; 3) "The Homosexual Marriage," C-3; 4) "The Lesbian, The Homosexual and the Bisexual," C-4; 5) a movie "Eight Inches", C-5; 6) "Sex in Marriage," lost by Commonwealth and not in evidence; 7) a prophylactic, C-6 not admitted into evidence upon ruling of Court; 8) a book of matches, C-7.

The officer made an *ad hoc* determination on the

obscenity of each item to make his selection and took them to the First Precinct, police station where they were placed under lock and key (T-104, Line 4-14). The items, publications and film were not viewed in their entirety (T-89, Line 23 - T-90, Line 17; T-96, Line 3-10).

On December 9, 1970, Sergeant Merritt removed the purchased materials and went to the office of Justice of the Peace, B.L. Smithwick requesting an arrest warrant charging Defendant with sale and possession with intent to sell obscene items. Justice Smithwick issued the arrest warrant based on the *ad hoc* determination and conclusory assertions of the police officer without scrutinizing the presumptively protected *First Amendment* material sought to be condemned by the judicial officer (T-105, Line 7 - T-110, Line 22) in determining if any of the material was obscene.

On the same date the warrant was issued and executed upon the Defendant. The warrant charged in one count "sale and possession with the intent to sell obscene items." The warrant failed to allege the Defendant "knowingly" committed an offense and failed to specify to whom any sale or intended sale was made and further failed to specifically delineate what "items" were charged as obscene. The warrant failed to specify a separate count for each offense charged.

Defendant was tried on January 18, 1971, before His Honor, Judge Llewellyn S. Richardson in the Municipal Court of the City of Norfolk wherein he was found guilty and sentenced to three months confinement and fined $1,000.00

On appeal before His Honor, Judge William Moultrie Guerry, the Court denied a formal Motion to Dismiss and also denied a formal Motion to Limit

Testimony of Witnesses who were alleged to have pretried the matter at a police community relation's meeting which was denied (T-5, Line 17 - T-7, Line 4).

During the course of the trial the Court permitted the Commonwealth's experts to testify over objection without proper qualification to so testify (as where Father H.H. Smith did not read the entire book, T-133, Line 19 - T-134, Line 5; and merely read portions he felt significant, T-134, Line 2 - 5; and did not view any completely, T-184, Line 8 - 22, T-185, Line 9, T-86, Line 8, and as to S.T. Barfield, T-256, Line 10 - 24, wherein he observed the photographs more than anything else). Also during the course of the trial a woman juror uttered a comment clearly revealing that she did not have an open and impartial mind but was prejudiced which utterance was made in the presence of other jurors (T-217, Line 2 through T-223, Line 19). Defendant moved for a mistrial due to a denial of trial by impartial Jury which was denied (T-223, Line 23). Father Smith readily admitted that his sampling of opinion was not a random sampling or selected grouping according to a sociologist's criteria (T-138, Line 3-6), and consisted merely of residents of Norfolk (T-138, Line 9). Yet Sergeant Merritt stated the material did not appeal to his prurient interest in sex (T-100, Line 2-7; T-101, Line 1-3; T-102, Line 12-14).

The Court set the tenor of the trial and confined all parties and Jury to consider the community standards of a locality and that they vary from community to community (T-338, Line 20 through T-339, Line 3).

Father Smith admitted that some of the material had some value (T-173, Line 17 through T-184, Line 25) or could possibly have value in that he had not read the text in its entirety. The Court permitted the

Commonwealth Attorney to inquire prejudicially into the sums paid the expert, Dr. R.M. Doud (T-350, Line 6-20; T-353, Line 9 through T-355, Line 8), before the Jury and in argument to them referred to Dr. Doud as being flown back and forth and being paid $300.00 for his testimony (T-501, Line 2-5) and that the dissemination of their material is a profitable operation requesting the maximum fine of $5,000.00 (T-501, Line 22-23), which objection was overruled (T-501, Line 24 through T-507, Line 9), and refused to declare a mistrial.

The Jury returned a verdict of guilty of selling obscene items and set the punishment of Defendant at $5,000.00 fine. This was an increase of the fine by $4,000.00 over the judgment appealed from.

## HOW FEDERAL QUESTIONS ARE RAISED

On behalf of Petitioner, the following affirmative defenses were raised before trial by Motion in the Corporation Court of the City of Norfolk; (a) facial invalidity of the warrants; (b) failure to allege "scienter"; (c) the materials were not obscene for adults as a matter of law; (d) the lack of probable cause upon which to base the issuance of the warrants. At trial and following the Commonwealth of Virginia's case in chief, these motions were renewed together with the following affirmative points: (a) the prosecution utilized local community standards rather than national or state-wide standards; (b) failure to produce affirmative evidence on each element of the offense; (c) and commonwealth testimony on the elements were not expert as required.

The Petitioner filed a timely Petition for Writ of Error to the Supreme Court of Virginia Docketed as R-

13361 raising, among other things, the following points: (a) can an arrest be consummated and a warrant issue upon the *ad hoc* determination of a police officer; (b) must scienter be both alleged and proven; (c) were the arrest warrants facially invalid; (d) is Section 18.1-228 of the Code of Virginia of 1950, as amended, unconstitutional upon its face and/or in its application and threatened application to Petitioner and, therefore, repugnant to the Due Process and Freedom of Expression provisions of the *1st, 4th, 5th,* and *14th Amendments* to the Federal Constitution.

The Supreme Court of Virginia, by Order on the 4th day of March, 1974, affirmed the Judgment rendered by the Circuit Court of the City of Norfolk, on November 23, 1971, (Record No. R-13661).

## REASONS FOR GRANTING THE WRIT

### I.

### The Commonwealth Of Virginia Statute Section 18.1-228 Is Void For Vagueness And Overbreadth In Violation Of The First And Fourteenth Amendments To The Constitution Of The United States.

Section 18.1-228 Code of Virginia of 1950, as amended reads as follows:

"Production, Publication, Sale, Possession, etc. of obscene items. Every person who knowingly:

1. Prepares any obscene items for the purposes of sale or commercial distribution;
2. Prints, copies, manufactures, produces or reproduces any obscene item for purposes of sale or commercial distribution;

3. Publishes, sells, rents, lends, transports in intrastate commerce or commercially distributes or exhibits any obscene item or offers to do any of these things;
4. Has in his possession with intent to sell, rent, lend, transport or commercially distribute any obscene item, shall be guilty of a misdemeanor [1960, c. 233.]"

On June 21, 1973, the United States Supreme Court announced its holdings in five (5) cases submitted after argument which has, from that time, changed the effective obscenity law.

The aforereferenced cases are:

A. *Miller* v. *State of California*, No. 70-73, 413 U.S. 15,

B. *Paris Adult Theatre I, et al* v. *Slaton*, No. 71-1051, 413, U.S. 49,

C. *U.S.A.* v. *Orito*, No. 70-69, 413 U.S. 139,

D. *Kaplan* v. *State of California*, No. 71-1422, 413 U.S. 115,

E. *U.S.A.* v. *12-200 Ft. Reels of Super 8mm Film, et al.*, No. 70-2, 413 U.S. 123.

On the basis of the foregoing decisions, this Court on June 25, 1973 and thereafter by summary action and/or per curiam decisions vacated more than sixty (60) cases and remanded them to the State or Federal Court, as the case may have been, for a review and reconsideration in light of such decisions.

The effect of the Court's decisions on the June 21 and June 25, 1973 obscenity cases has caused irreconcilable conflicts in both Federal and State jurisdictions as to what this Court intended to be done as to pre-June 21st conduct.

The State of Louisiana, in the case of *Gulf States Theatres of Louisiana, et al,* v. *Richardson, et al* on remand concluded that what the U.S Supreme Court had done is to have said that the *Roth-Memoirs* standards employed in the cases before it were unconstitutionally vague and for this reason set down a new constitutional standard. Thus the Supreme Court of the State of Louisiana held its obscenity law unconstitutional and went on to state that it was not the task of the judiciary to authoritatively construe or rewrite legislation and that it was the express function of the Legislature to so act.

The State of Indiana on remand of cases of *Mohney* v. *State* and *Stroud* v. *State* in the U.S. Supreme Court held that the effect of the U.S. Supreme Court's decision was to say that the *Roth-Memoirs* formulation for determining obscenity was unconstitutionally vague and they thus held that their state statutes were likewise unconstitutionally vague. (See *Mohney* v. *State*, 300 N.E. 2d 66 and *Stroud* v. *State*, 300 N.E. 2d 100.)

The Commonwealth of Massachusetts very recently, as reported in Mass. Advance Sheets (1974) and decided on April 23, 1974, ruled that their Obscenity Statute §28A was constitutionally inadequate. See *Commonwealth* v. *George C. Horton*, (Mass. Adv. Sh. [1974] decided April 23, 1974); *Essex Theatre Corporation* v. *Police Commissioner of Boston*, (Mass. Adv. Sh. [1974]); *Commonwealth* v. *Capri Enterprises, Inc.*, (Mass. Adv. Sh. [1974]).

The *Commonwealth* v. *Horton* decision in attempting to analyze the *Miller* opinion commented that in at least one material respect the *Miller* case reduces the area of *First Amendment* protection from that existing under the *Roth-Memoirs* test. Today a

work not "utterly without social value" but of less than "serious literary, artistic, political, or scientific value" may be prohibited as obscene, whereas before it could not. This, by the very nature of the context of the language presupposes that the Court is speaking of the standard in a prospective manner, that is, *after* the decision of *Miller*.

That Massachusetts Court distinguishes between pre-*Miller* and post-*Miller* activities and conduct as rightly and consistently it should have done and thereafter declined to undertake to furnish, even on a prospective basis, a judicial interpretation of that sexual conduct which their statute provides should not be portrayed.

That Court held to not provide even a prospective judicial interpretation of that sexual conduct which the Massachusetts statute provides should not be portrayed. That Court went on to say that to do so would require them to engage in a function which they, perhaps more than many courts, have been traditionally reluctant to perform. It is true that, despite traditional reluctance, that court has for many years undertaken to protect such vestiges of their obscenity statutes as it could from the erosion of waves of constitutional onslaught. In doing so they have suggested that their obscenity statutes apply as far as the Federal Constitution may permit. That itself has been a standard of some uncertainty, subject to abrupt change, as the *Miller* case so clearly shows. It may seem strange that they appear to have abandoned the struggle just as the tide may have turned. It is, however, for that very reason that they declined further to engage in the function of saving judicially a statute which is of great ambiguity on its face.

This Court's majority opinion in *Miller* v. *California*,

supra, delivered by Chief Justice Burger, indicated the cautionary measures and attitudes in the tone of the following language:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc.*, v. *Dallas*, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

The opinion of Mr. Chief Justice Burger speaking for the majority pointing to the prospective operation of the newly announced constitutional standards, after either future legislative enactment or authoritative judicial construction (if possible) stated at page 3164:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice

to a dealer in such materials that his public and commercial activities may bring prosecution. See *Roth* v. *United States*, supra, 354 U.S. at 491-492 (1957)."

" . . . This case involves the application of a State[s] criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. *Stanley* v. *Georgia*, 394 U.S. 629, 637-643 (1968) et als. It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."

*Miller* v. *California*, *supra*, is the pivotal case in which the United States Supreme Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the *First Amendment* protection. It is patently obvious that the Court undertook to formulate standards more concrete than those that have ever existed previously. Clearly, if the provisions of the Statute are to be limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically

defined in writing by the legislature, or if specific hard core sexual conduct must be read into the statute by authoritative judicial construction, the present Statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It appears to be very apparent that in view of the *Miller* decision it is now necessary for the Virginia Legislature to create legislation if they so wish, proscribing the tests suggested in *Miller* so that prospectively from the effective date of such legislation any interpretation or construction of the *Miller* test can permissibly be left to the Courts. Such construction by the Courts, of course, can not realistically take place until there exists a constitutionally permissible statute to interpret. The current Virginia Statute §18.1-228, Code of Virginia, 1950, as amended, omits any specificity of any definition of sexual conduct as required by the *Miller* decision and must fail the constitutional test. Any post-*Miller* judicial construction by the Virginia Supreme Court to attempt compliance with the *Miller* decision must also fail as to the Petitioner as he would be without the fair and reasonable warning and notice required by the Due Process Clause of the Constitution of the United States.

Along these lines, reference is again made to this Court's recital in *Miller* v. *California, supra:*

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice

to a dealer in such materials that his public and commercial activities may bring prosecution."

It is respectfully submitted that any case pending trial or review based on pre-June 21, 1973 conduct, should be set aside where there has not been given the "fair warning or notice" suggested by this Court in *Miller*.

Any case, criminal or civil pending trial or appellate review based on pre-*Miller* conduct, in a jurisdiction where as, in the case at bar, there had been no authoritative judicial construction specifically defining the punitive patently offensive hard-core sexual conduct prior to the date on which the sale of the sexual materials allegedly occurred should be granted certiorari by this Court and revised. To "invisibly write into" the statute as stated or as subsequently might be construed by authoritative judicial construction so as to eliminate the State Legislature from having to enact a valid constitutionally permissible statute punishes one for conduct that was not criminal at the time that it was committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. It is, therefore, apparent that the constitutional requirement of definitiveness is violated by the Virginia statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held punitively responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in such conduct.

If this Court should fail to strike down the Virginia Statute as being vague and constituting overbreadth the

end result would be to permit an unforeseeable judicial enlargement of such criminal statute which would, in effect, be applied retroactively and operate as if it were an approved *ex post facto* law. This Court would have no problem in striking down an *ex post facto* law passed by the Congress of the United States or a State Legislature and it is respectfully submitted that this Court should have as little problem in insuring that the judicial construction does not accomplish the same unlawful end.

The basic rule is that a penal statute is void for vagueness where it is not sufficiently explicit to give fair notice and fair warning of what conduct is forbidden and proscribed. *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *United States* v. *Harriss*, 347 U.S. 612 (1954); *Rabe* v. *Washington*, 405 U.S. 313 (1972).

This principle is also applicable where the uncertainty of the statute is not clearly revealed until and except by the court's decisions. In *Bouie* v. *City of Columbia*, 378 U.S. 347, at p. 352, the court said:

> " . . . If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta*, or the 'guess at [the statute's] meaning and differ as to its application,' as in *Connally*, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

Accordingly, the utilization of *Miller* standards for pre-June 21, 1973 conduct is violative of Petitioner's

constitutional rights and his conviction should be set aside and this case should be reversed.

## II

## The Items Charged Against Petitioner Are Not Obscene In The Constitutional Sense And Should Be Provided Protected Expression Under The First And Fourteenth Amendments To The Constitution Of The United States As Applicable At The Time Of The Alleged Sale.

A fountainhead for the definition of obscenity decided well over a decade ago was *Roth* v. *United States*, 354 U.S. 476. The primary question there was whether obscenity constituted protected expression under the *First Amendment*. This Court ruled then that it did not. The opinion also held that the constitutional protection was available to all ideas having even "the slightest redeeming social importance". The Court further held that sex and obscenity were not synonymous and that ceaseless vigilance was the watchword to prevent the erosion of freedoms under the Constitution.

On April 7, 1969, the Supreme Court in a decision of paramount importance came to grips with the problem once again and finally upheld the right to private possession of *First Amendment* materials irrespective whether they were "hardcore" pornography or not in the matter styled *Stanley* v. *Georgia*, supra, Mr. Justice Marshall stated:

> "It is now well established that the Constitution respects the right to receive information and ideas

> . . . This right to receive information and ideas regardless of their social worth . . . is fundamental to our free society."

Along these lines, Mr. Justice Douglas in *Griswold* v. *Connecticut*, 381 U.S. 479, stated:

> " . . . (T)he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. *The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . Without those peripheral rights the specific rights would be less secure.*" (Emphasis supplied.)

One, who has the constitutional right to possess "Obscene" material and the right to receive it, of necessity must have the right to purchase the materials. It cannot be argued that the right to read a book or newspaper is secure and by statute preclude the sale or dissemination of the same publications. These same citizens cannot be required to obtain the materials illegally in order to lawfully possess them.

On April 29, 1970 the United States District Court for the Eastern District of California in *U.S.* v. *Robert Irvine Lethe*, 312 F. Supp. 421, heard a case wherein the defendant was arrested and tried for mailing "nonmailable" obscene materials. One of the defenses presented was an attack upon the indictment asserting the government cannot constitutionally make it a crime to send obscene materials through the mails to an adult who requested them, reference having been made to *Stanley* v. *Georgia*, supra. The Court sustained this contention.

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), the Supreme Court struck down the Connecticut statute restricting the dissemination of contraceptive information and materials to willing adults. The Court held that the freedom of speech and press includes the right to distribute, receive and read. In essence, where a willing adult sought information, the State could not place an impediment to the receipt and use of the materials consistent with fundamental *First Amendment* freedoms.

In the case styled *U.S.* v. *Various Articles of Obscene Merchandise, (Schedule No. 495)* U.S.D.C., S.D. N.Y., *Case No. 68 Civ. 2971* (decided 6/8/70), the Court held that a citizen may constitutionally obtain and receive "obscene" material through importation. The Court held that the customs statute was unconstitutional in its application wherever a citizen desired to receive these materials whether obscene or not.

The publications involved in the case at bar should be judged, if at all, by the status of the law and the standards being applied by the Courts as of the time of the conduct complained of. Briefly, the law which was being applied at that time by this Court permitted a certain type of judicial review which has been characterized as the *Redrup* approach (*Redrup* v. *New York*, 386 U.S. 767.) This Court, in essence, suggested that the evil to be defeated was that of the sale to minors or the aggressive forceful foisting of the material or publications upon an unwilling recipient.

In the case at bar, the recipient was far from unwilling, but in fact, was an undercover Detective requesting the publications as a "test case".

It is significant to note that findings of obscenity have been reversed as to press materials devoted

entirely to explicitly depicting or describing the sexual activities of its characters, including detailed descriptions reaching the ultimate in explicitness of heterosexual intercourse, masturbation, bestiality, oral-genital intercourse, sado-masochism, and homosexual activity; *e.g.*, *Memoirs* v. *Massachusetts*, supra; *Aday* v. *United States*, 375 F. 2d 855; *Corinth Publications* v. *Wesberry*, 146 S.E. 2d 764; *Grove Press* v. *Gerstein*, 378 U.S. 577 (1964) ("Tropic of Cancer").

With respect to pictoral publications the Court has reversed findings of obscenity as to films which depict totally nude women, films which show nude or partially nude women and men engaged in sexual gyrations, simulated intercourse, and simulated oral-genital intercourse, all emphasizing pubic and rectal areas, films showing lesbian sexual activity and heterosexual activity between men and women. Moreover, the Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity of a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus* v. *Pitchess*, 429 F.2d 416 (CA-9 1970), *aff'd* 400 U.S. 922 (1970), *sub. nom.*, *Pinkus* v. *California*.

It would, therefore, seem to be that any publication containing pictorial material which depicts, graphically and exclusively, nudes in sexual poses and movement, even without presence of social importance, is constitutionally protected. It is, therefore, respectfully submitted that the publications at bar when considered as a whole, and as judged against press materials and pictorial materials of similar sexual content heretofore determined by this Court, not to be obscene in the constitutional sense, should thus be held protected, and

the decision of the Supreme Court of Virginia should be summarily reversed.

## III

## The Due Process Clause Of The Constitution Renders It Necessary For The Warrants To Allege And The Prosecution To Adequately Prove Scienter In Order To Support A Conviction.

The warrant filed charging Petitioner with violating the Virginia obscenity statutes fails to recite any factual allegations constitutionally sufficient to make out an alleged offense, nor does it include the essential element of "scienter" or guilty knowledge. The warrant merely recites "items" in the language of the statute in a conclusory way. There are no allegations as to a depiction of sexual activity, that there was, in fact, "pandering" as found significant in *Ginzburg* v. *United States,* 383 U.S. 463, nor is there alleged an attack upon the privacy of an unwilling adult individual. Therefore, the Petitioner, at every stage of the proceedings commencing with the indictment, was unable to ascertain specifically what it was in the publications sold that were purported to be, in fact, obscene.

It was effectively stated in *United States* v. *Luros,* 253 F. Supp. 160, (1965), (reversed on grounds in 389 F.2d 200 (1968) that:

> "An indictment is sufficient if it (1) alleges all of the elements of the offense, (2) fairly informs the defendant of that which they must be prepared to meet in the preparation of their defense, and (3)

enable them to plead an acquittal or a conviction in bar of future prosecutions for the same offense."

The indictment in the case at bar failed to meet those requirements.

In various jurisdictions wherein the Appellate Courts have construed their respective obscenity statutes to embrace the element of scienter either by implication or by such requirement being expressly stated in the statute, the various state and federal courts have required that an averment be contained in the criminal complaint that the accused had scienter or knowledge of the obscene character or portions of the instant motion picture film and/or publications, and should be set forth with particularity.

In *Cohen* v. *State, Fla.* 125 So.2d 560, the Court held in essence that the Florida state obscenity statute could be construed as though it contains the requirement of scienter, *Smith* v. *People of the State of California*, 361 U.S. 147, however, it was constitutionally required by the Florida Appellate Court that the Defendant be charged in an indictment or information with "knowledge" or "scienter" under any indictment or information initiated under the state obscenity statute.

It was further stated in *Cohen* v. *State*, supra, as follows:

> "It follows from this construction of the subject statute that the information under which the appellant was charged was fatally defective for want of an averment that the appellant had sold and distributed the publications involved, knowing it to be obscene, lewd, etc. in character."

In the case of *State* v. *Oman*, 121 N.W. 2d 616

(Minn.-1963), it was stated:

> "It is well established that the charge must fully, directly, and expressly, without uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished. *Evans* v. *United States*, 153 U.S. 584."

In *People* v. *Douglas*, 209 N.Y.S. 2d 734, 12 A.D. 2d 194 (1961) it was stated by the Supreme Court of New York, as follows:

> "In further argument that the court should construe the statute as requiring scienter for conviction and thus uphold it where two constructions are possible, one of which will hold the act constitutional, he cites *People ex rel. Simon* v. *Bradly*, 207 N.Y. 592, 610-611, 101 N.E. 766, which indicated that the Court construe the statute to require scienter and hold that the Special County Judge was in error when he held the statute unconstitutional.
>
> "It is our view, however, that the indictment is insufficient as it fails to allege knowledge on the part of the defendants. Having decided that scienter is an essential element of the crime it would seem that this element must be alleged in an indictment. The various counts of the indictment state that defendants sold obscene magazines. This is not a crime unless the magazines are sold with the knowledge, actual or constructive, that they were obscene. Such a defect would be jurisdictional."

The record of the proceedings below is completely devoid of any competent evidence that the Petitioner, in fact, had any knowledge that the content and character of the materials upon which he is charged were, in fact, obscene. It is axiomatic that mere possession fails to establish "scienter".

This Court has stated concerning imposed knowledge in *Smith* v. *California*, 361 U.S. 147, beginning at 152, as follows:

> "The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller, if in fact there is to be found in his shop an obscene book. But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold."

Inasmuch as the Virginia Obscenity Statute, Section 18.1-228 of the Code of Virginia, 1950, as amended, specifically sets forth the word, "knowingly" in the first paragraph of the Statute, any conviction in the case at bar with the absence of the allegation of scienter in the warrant and in further absence of evidence of Appellant's scienter during the trial, unconstitutionally abridge and violate Petitioner's freedom of speech and press.

## IV.

## The State Court's Utilization Of A Purely Local Contemporary Community Standard As Opposed To A State-Wide Contemporary

**Community Standard Violates Petitioner's Rights Under The First And Fourteenth Amendments To The Constitution Of The United States.**

In *Miller* v. *California*, supra, this Court held that the Trial Court's use of the "contemporary standards of the State of California" in evaluating the material in question was "consitutionally adequate". "People in different *States* vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." See also *Kaplan* v. *California*, 413 U.S. 115.

In the case at bar the Court held that it was permissible to apply "local" community standards.

It is respectfully submitted that it is constitutionally impermissible in any case to apply "local", as opposed to statewide, community standards in evaluating the prurient interest appeal and the patent offensiveness of allegedly obscene material. The *First Amendment* protects works which, taken as a whole, have serious literary, artistic, political or scientific value, *regardless* of whether the government or a majority of the people approve of the ideas these works represent.

The statewide application set forth in the opinion of *Miller* v. *California*, supra, would by its nature effect uniformity throughout the state and to apply a standard on a local community basis, rather than statewide would result in utter chaos throughout the municipalities and localities of the state in understanding and determining what would be obscene in an individual locality.

The *First Amendment* policy strongly favors the application of statewide, rather than "local,"

community standards in obscenity cases. For when an obscenity determination is made on the basis of a "local" standard and such decision is affirmed by the highest court of the state or Commonwealth, that decision prohibits the sale or exhibition of the material involved throughout the entire state. That would mean that the most conservative and "holier than thou" community within a state could set the standards of obscenity and the restrictions on the right of freedom of the press and freedom of religion for the entire state on the single criteria that the issue of obscenity in a certain book or film was tried in the courts of that locality before ever tested in any other locality in the state.

It would, therefore, appear that to approve a "local" community standard would be to place in the hands of a very few the tastes and cultural advancement of the many who are members of the greater whole state community.

It is respectfully submitted, therefore, that this United States Supreme Court should require that what may be seen and viewed by the citizens of an entire state should, by state law and constitutional permissibility be governed by the community standards of the entire state.

In the California case styled *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535 (1968), *cert. denied*, 395 U.S. 910 (1969), the Supreme Court of California concluded that:

> " . . . on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller

> community: whether it should be city, county, individual neighborhood within a city, or whatever. Moreover, a strong policy favors uniformity in application of state criminal law; we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform 'community.' "

Accordingly, to the extent that the opinion of *Miller* v. *California,* supra, and the other decisions of June 21 and June 25, 1973 may have left open the question of local or statewide community standards, it presents a substantial federal question and should be resolved by this Court as indicated above on a statewide basis.

Along these lines, it is significant to note that the Supreme Court of the State of Washington, for example, has already held that the community standards to be applied in accordance with this Court's decisions of June 21 and June 25, 1973, are *statewide* rather than "local." *State* v. *J-R Distributors, Inc.,* 512 P. 2d 1049, 1065 (July 27, 1973).

The Commonwealth of Virginia in the case at bar and in the case of *Price* v. *Commonwealth of Virginia,* 201 S.E. 2d 798, has adopted a purely local community standard as opposed to a state standard for judging obscenity and has stated that it would be difficult, if not impossible, for a Virginia jury to formulate a statewide standard of obscenity, for our state comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities. Moreover, Virginia juries have traditionally relied on local rather than statewide

community standards.

The foregoing rationale of the Virginia Supreme Court of Appeals is illusory in that it ignored the overture from Chief Justice Burger to authoritatively construe its obscenity statute so as to specify the patently offensive hard-core sexual conduct and to adopt the statewide contemporary community standard test as distinguished from the national test, as suggested by the opinion of *Miller* v. *California,* supra.

## CONCLUSION

The Commonwealth of Virginia Supreme Court in its decision in *Goldstein* v. *Commonwealth of Virginia,* affirmed the Judgment below on the basis of *Price* v. *Commonwealth,* by making reference thereto and it is apparent that the constitutional failings in *Price* v. *Commonwealth,* are equally applicable to the case at bar.

Accordingly, inasmuch as the Virginia Obscenity Statute 18.1-228 should be deemed void as unconstitutional and since the Trial Court refused to consider any community standards beyond the local community level and in further view of the fact that the publications were not obscene and that the Petitioner was not afforded due process as to the Commonwealth's allegation in the warrant and proof during the trial of the element of scienter and for all the reasons set forth in the Argument contained in this Petition, Petitioner respectfully prays that this Honorable Court grant this Petition for Writ of Certiorari and that the Judgment of the Supreme Court of the Commonwealth of Virginia of March 4, 1974 be reversed, that the obscenity statute be held to be unconstitutional, and that

the publications be held not to be obscene in a constitutional sense.

Respectfully submitted,

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*Counsel for Petitioner*

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Petition for Writ of Certiorari to the Supreme Court of the United States upon counsel for the Respondent, Andrew P. Miller, Attorney General of Virginia, and Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, Supreme Court-State Library Building, Richmond, Virginia 23219, and Joseph H. Campbell, Commonwealth's Attorney, City Hall Building, Norfolk, Virginia 23510, by depositing copies of said Petition for Writ of Certiorari in the United States Mail, properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served this 29th day of May, 1974.

ROBERT S. COHEN
*Of Counsel for Petitioner*

# APPENDIX A

WARRANT FOR MISDEMEAN

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK, to wit

**To any of the Police Officers of the City of Norfolk:**

WHEREAS **Sgt. L.N. Merritt** **Norfolk Police**
No
hereinafter called complainant of the City of Norfolk,
has this day made complaint and information on oath, before me, **B.L. Smithwick** a Justice
of the Peace of said City, that on the **8** day of **December** 19**70** in said City
**Arthur Goldstein**
hereinafter called accused did unlawfully

**Vio. Sec. 18.1-228 of the State Code of Virginia as amended**

**to-wit ; Sale and possession with the intent to sell obscene items.**
**Place of occurance 311 Granby Street at approx. time 9:45 PM**

and whereas I see good reason to believe that an offense has been committed
These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and take
before the Police Judge of said City in the Municipal Court Part thereof
Judge of the Juvenile and Domestic [illegible] Court of said City in the Juvenile and Domestic
the body of the said accused to answer said complaint and be further dealt with according to law.

And moreover upon the arrest of the said accused by virtue of this warrant I command you in the name of the Commonwealth of Virginia to summon to appear at the same time and place to testify as witnesses on behalf of the Commonwealth touching the matter of said complaint the above named complaint and the following persons

and have there and then this warrant with your return thereon

Given under my hand and seal this **9** day of **December** 19**70**

Justice of the Peace (Seal)

Upon hearing the evidence on the foregoing charge, the above mentioned accused is found guilty as charged in said
warrant, and I do therefore adjudge that he be confined in the jail of the City of Norfolk for the term of
and do pay a fine of $ and $ costs incident to said prosecution
and conviction as provided by law

And I do further require that said accused do give bond with sufficient surety in the sum of $ for the
term of from this date to keep the peace and be of good behavior towards all persons of this
Commonwealth

On motion of said defendant an appeal is granted to the next term of the Corporation Court of the City of Norfolk Part
to wit the first Monday in , 19 and the witnesses above named were
severally duly recognized each, in the sum of One Hundred ($100.00) Dollars payable to the Commonwealth of Virginia
for their appearance before said Court to give evidence on said charge and not to depart hence without leave of said Court

Given under my hand this day of 19

Police Judge

# APPENDIX B

## *VIRGINIA:*

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Tuesday *the* 11th *day of* July, 1972.

The petition of Arthur Goldstein for a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Norfolk on the 23rd day of November, 1971, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: Allen L. Levy

Deputy Clerk

# APPENDIX C

*VIRGINIA:*

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Monday *the* 4th *day of* March, 1974.

Arthur Goldstein, Plaintiff in error,

against Record No. R-13661

Commonwealth of Virginia, Defendant in error.

From the Circuit Court of the City of Norfolk
(Formerly the Corporation Court of the City of Norfolk)

On August 3, 1973, the clerk of this court received a copy of an order entered in this case by the Supreme Court of the United States on August 2, 1973, heretofore recorded, which recited that on June 25, 1973, it had ordered that the judgment of this court entered on July 11, 1972, "be vacated, and that this cause be remanded to the Supreme Court of the Commonwealth of Virginia for further consideration in light of Miller v. California, ___ U.S. ___ (1973); Paris Adult Theatre I v. Slaton, ___ U.S. ___ (1973); Kaplan v. California, ___ U.S. ___ (1973); U.S. v. 12 200-ft. Reels of Super 8mm Film, ___ U.S. ___ (1973); U.S. v. Orito, ___ U.S. ___ (1973); Heller v. N.Y., ___ U.S. ___ (1973); Roaden v. Ky., ___ U.S. ___ (1973); and Alexander v. Virginia, ___ U.S. ___ (1973)."

Upon mature consideration whereof, and the court having reconsidered this decision in this case in light of Miller v. California; Paris Adult Theatre I v. Slaton; Kaplan v. California; U.S. v. 12 200-ft. Reels of Super 8mm Film; U.S. v. Orito; Heller v. N.Y.; Roaden v. Ky. and Alexander v. Virginia, is of opinion to adhere to its ruling rendered herein on July 11, 1972, affirming the judgment rendered by the Circuit Court of the City of Norfolk on November 23, 1971, and it is so ordered. See Alexander v. Commonwealth, 214 Va. ___, this day decided, and Price v. Commonwealth, 214 Va. ___ (1974).

Which is ordered to be forthwith certified to the said circuit court.

A Copy,

Teste:

Clerk

# APPENDIX D

*VIRGINIA:*

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Wednesday *the* 27th *day of* March, 1974.

Arthur Goldstein, Plaintiff in error,

against Record No. R-13661

Commonwealth of Virginia, Defendant in error.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment rendered herein on March 4, 1974, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-entitled case rendered on March 4, 1974, be, and the same is hereby, stayed, until the 2nd day of June, 1974, on the expiration of which time the same may be enforced, unless before that time a notice of appeal to the Supreme Court of the United States has been filed in accordance with the Rules of the Supreme Court of the United States and the case is thereafter docketed therein within the time provided by the Rules of that court, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

Clerk

## APPENDIX E

## CONSTITUTION OF THE UNITED STATES AMENDMENTS TO THE CONSTITUTION

### [Amendment I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

******

### [Amendment IV]

**[Security from Unwarrantable Search and Seizure]**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

******

### [Amendment V]

**[Rights of Accused in Criminal Proceedings]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation.

******

**[Amendment VI]**

**[Right to Speedy Trial, Witnesses, etc.]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Cousel for his defense.

******

**[Amendment XIV]**

**Section 1.**

**[Citizenship Rights Not to Be Abridged by States]**

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

******

## CODE OF VIRGINIA

## OBSCENITY

18.1-227. "Obscene" defined.—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion,

and if it goes substantially beyond customary limits of candor in description or representation of such matters."

18.1-228. Production, publication, sale, possession, etc., of obscene items.—Every person who knowingly:

(1) Prepares any obscene item for the purposes of sale or distribution; or

(2) Prints, copies, manufactures, produces or reproduces any obscene item for purposes of sale or distribution; or

(3) Publishes, sells, rents, lends, transports in intrastate commerce, or distributes or exhibits any obscene item, or offers to do any of these things; or

(4) Has in his possession with intent to sell, rent, lend, transport, or distribute any obscene item, shall be guilty of a misdemeanor. Possession in public or in a public place of any obscene item as defined in this article shall be deemed *prima facie* evidence of a violation of this section.

For the purposes of this section "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another.

18.1-229. Obscene items enumerated.—Obscene items shall include:

(1) Any obscene book or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph, film, negative, slide, motion picture; or

(3) Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words, or sounds.

Supreme Court, U. S.
FILED
AUG 27 1974
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1973

No. 73-1801

ARTHUR GOLDSTEIN,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA**

**BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI**

ANDREW P. MILLER
*Attorney General of Virginia*

ROBERT E. SHEPHERD, JR.
*Assistant Attorney General*

Supreme Court–State Library Building
Richmond, Virginia 23219

## TABLE OF CONTENTS


*Page*

PRELIMINARY STATEMENT ..... 1

OPINION BELOW ..... 2

JURISDICTION ..... 2

QUESTIONS PRESENTED ..... 2

STATEMENT OF THE CASE ..... 3

ARGUMENT

I. The Virginia Obscenity Statutes Involved In The Prosecutions Herein, As Construed By The Supreme Court Of Virginia, Both Prior To The Instant Case And In the Case Of *Price v. Commonwealth*, 214 Va. 490, 201 S.E.2d 798 (1974), Are Both Facially Constitutional And As Applied To The Materials Depicting Or Describing Sexual Conduct As In This Case. ..... 8

II. The Materials Involved In The Instant Case Are Clearly Obscene As A Matter Of Law And As A Matter Of Fact And The Jury And The Courts Below Were Clearly Correct In Their Conclusions To That Effect. ..... 14

III. The Petitioner Does Not Demonstrate In What Regard The Arrest Warrants Were Fatally Defective Where There Is No Claim Made In The Petition For A Writ Of Certiorari That The Instructions Given To The Jury Were Inadequate Or That The Petitioner Was Not Advised As To The Nature Of The Charges Against Him Or Which Specific Obscene Items He Was Charged With Selling. ..... 15

IV. The Supreme Court Of Virginia Properly Has Ruled That The Appropriate Community Standard To Be Applied In An Obscenity Case Is A Local Community Standard As Opposed To A State-Wide Or National Community Standard ..... 16

CONCLUSION ..... 21

CERTIFICATE OF SERVICE ..... 22

## TABLE OF CITATIONS

### Cases

*Page*

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966) ..... 12, 13

Alexander v. Virginia, 413 U.S. 836 (1973) ..... 11

Grove Press Inc. v. Evans, 306 F.Supp. 1084 (E.D. Va 1969) .... 10

Hamling v. United States, ..... U.S. ..... 15 Cr.L. Rptr. 3239 (1974) ..... 14, 18, 20

Heller v. New York, 413 U.S. 483 (1973) ..... 11

House v. Commonwealth, 210 Va. 121, 169 S.E.2d 572 (1969) 10, 12

Jenkins v. Georgia, ..... U.S. ....., 15 Cr.L.Rptr. 3259 (1974) 15, 18, 20, 21

Kaplan v. California, 413 U.S. 115 (1973) ..... 11

Miller v. California, 413 U.S. 15 (1973) ..... 2, 10, 12, 13, 14, 17, 18

Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798 (1974) 8, 14, 17

Price v. Commonwealth, 213 Va. 113, 189 S.E.2d 324 (1972) 9, 10, 12, 14, 16

Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) ..... 11

Roaden v. Kentucky, 413 U.S. 496 (1973) ..... 11

United States v. Orito, 413 U.S. 139 (1973) ..... 11

United States v. 12 200-Ft. Reels of Super 8-mm Film, 413 U.S. 123 (1973) ..... 11

### Other Authorities

18 U.S.C. § 1461 ..... 14

28 U.S.C. § 1257(3) ..... 2

Section 18.1-227, Code of Virginia (1950), as amended ... 8, 9, 10, 14

Section 18.1-228, Code of Virginia (1950), as amended ..2, 8, 9, 14, 15

1st Amendment, Constitution of the United States ..... 2

14th Amendment, Constitution of the United States ..... 2

In The

# Supreme Court of the United States

October Term, 1973

No. 73-1801

ARTHUR GOLDSTEIN,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA**

**BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI**

## PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on March 4, 1974, reaffirming its prior ruling of July 11, 1972, and affirming the judgment of the Circuit Court of the City of Norfolk after consideration of the intervening decisions of this Honorable Court, not be granted.

## OPINION BELOW

The judgment of the Supreme Court of Virginia is not reported but it is contained in the Appendix to the Petition for a Writ of Certiorari at page A. 3.

## JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257 (3).

## QUESTIONS PRESENTED

1. Is the Commonwealth of Virginia obscenity statute, Section 18.1-228 of the Code of Virginia, 1950, as amended, void for vagueness and overbreadth in violation of Petioner's rights under the *1st* and *14th Amendments* to the Constitution of the United States by virtue of this Court's decision in *Miller* v. *California, et als*, decided on the 21st day of June, 1973?

2. Are the items charged against Petitioner obscene in the constitutional sense and, therefore, not permitted protection under the law as it was applicable at the time of the sale?

3. Was it co..stitutionally necessary for the warrants to charge scienter and was there adequate affirmative proven evidence of scienter as is required by Due Process?

4. Does the State Court's utilization of a purely local contemporary community standard, as opposed to a statewide contemporary community standard violate Petitioner's rights under the *1st* and *14th Amendments* to the Constitution of the United States?

## STATEMENT OF THE CASE

On December 8, 1970, Sergeant Leonard Merritt of the Norfolk Police Department went to Henderson's News Stand located at 311 Granby Street in the City of Norfolk, between 9:00 and 9:15 a.m. (T. 36-37, 89).* When he arrived the defendant and two customers were present and, after Merritt made some inquiry, the defendant selected a book from the bookshelf, thumbed through it, showed him pictures and stated "here is another good one with a lot of action and beaver hair" (T. 37, 44). The defendant specifically showed Sergeant Merritt certain of the photographs, and he then picked another book and made a similar statement (T. 46-47). The defendant picked out yet another book, entitled *The Homosexual Marriage*, asked if he knew men that liked men, thumbed through it and pointed out that it had several pictures "of men in action" (T. 47, 50-51). He picked out an additional book, entitled *The Lesbian, The Homosexual and The Bisexual* and said, "here is another good one with everything in it" (T. 51). The defendant finally picked up a movie, opened the box himself, took a still picture out and stated that "they eat each other in this movie" (T. 51-52). Sergeant Merritt purchased all of these items and, at the time, of the purchase, the defendant gave him a book of matches with an explicit photograph inside (T. 62). All of these items were introduced into evidence as Exhibit C-1, C-2, C-3, C-4, C-5 and C-7.

Sergeant Merritt also introduced into evidence certain photographs taken of the defendant's store on December 9th which showed that the store had open glass windows and sold general merchandise, including "hot dogs, paper

* For purpose of clarity, the petitioner will hereinafter be referred to as the defendant, and references to the trial transcript will be cited as (T. .....).

cups, travel emblems, air pistols, all sorts of things which are exposed to the public for sale, in addition to these things" (T. 65-81). The photographs also showed that several of the items purchased were in a glass show-case just 10 to 15 feet inside the front door of the defendant's store, and it was the first thing you saw when you entered the store (T. 79). The store was located on Granby Street in the heart of downtown Norfolk and, at the time that the photographs were taken, they had to get police officers to stop the heavy pedestrian traffic in front of the defendant's store so that the pictures could be taken (T. 80, 89). All of the items purchased by Sergeant Merritt were introduced into evidence and given to the jury with instructions that they should read through them and the film that he purchased was shown to the jury on a projector (T. 124, 127). Sergeant Merritt testified that the defendant thumbed through practically all of the items that he purchased and made comments as to the contents of the items in a suggestive manner (T. 116).

The rest of the testimony at the trial amounted to expert testimony regarding the community standards, and regarding the obscenity of the items introduced into evidence. Herbert Hugh Smith, Jr., was an Episcopal priest at the Church of the Advent in Ocean View in Norfolk and he had been a priest since 1958 and in Norfolk since 1960 (T. 129-130). During that period of time he had been engaged in a number of civic ventures and he had engaged in extensive discussions relative to obscenity with other professional people and members of the general public in numbers exceeding 1,000 (T. 131-133). Smith had read and seen all of the items introduced into evidence and he testified that the material that he examined had as its dominant theme an appeal to a prurient interest in sex, was also patently

offensive and contrary to contemporary community standards in its descriptions or representation of sexual matters, and was utterly without redeeming social value (T. 134-135, 160-165). It was his view that items should be considered obscene if they violated "the integrity of the individual by using him or her for hedonistic pleasure" (T. 180). This was his personal opinion and not his opinion as an expert. He felt that the pictures in each of the books were the predominant portrayal, and the text was not in any way supportive of the pictures. The two appeared almost to be unrelated. He felt that the text did serious damage to persons, particularly the one dealing with homosexuality which appeared to encourage homosexual marriages (T. 192).

Sam Theodore Barfield was the Commissioner of Revenue for the City of Norfolk and had lived in the City of Norfolk for 48 years (T. 231). At the time of trial he was in his second year as Commissioner of Revenue and prior to taking that office he had been on the Norfolk City Council for nine years (T. 231-232). He had been interested in the subject of pornography and obscenity since 1957 and for the eight years prior to trial he had spoken in excess of 148 times on the subject to civic groups containing well over 10,000 people in Norfolk and Virginia Beach (T. 232-234). He had also testified before committees of the General Assembly of Virginia and had appeared before the State Crime Commission. The previously referred to groups reflected the entire spectrum of society and many of them were from other parts of the country. He felt that the number of people that he had spoken before and with was closer to 20,000, and he had viewed or read all of the exhibits introduced (T. 246, 255-256). He felt that the items in question appealed to a prurient interest in sex and

were offensive to contemproary community standards. On cross-examination, he agreed that the nude figure was not obscene, but the manner of depiction would be the major determinant (T. 266). At the close of Barfield's testimony, the Commonwealth rested and a motion to strike the Commonwealth's evidence made by the defendant was overruled (T. 281-300).

Dr. Robert Maurice Doud, an Assistant Professor of Family Health and Population Dynamics and an Assistant Professor of Public Health and Tropical Medicine at Tulane University School of Medicine in New Orleans, Louisiana, testified on behalf of the defense (T. 302-303). He had traveled extensively throughout the country and was allowed to testify as to both local community standards and national community standards, although the trial judge ruled that the appropriate community standard was a local community standard (T. 312-339). Dr. Doud had reviewed all of the prosecution exhibits and was of the opinion that the books did not appeal to a sick or morbid interest in sex (T. 341-344). He stated that 98 per cent of the people in Norfolk would not be offended by the material, but on cross-examination he retreated some and indicated that the report of the President's Commission on Obscenity revealed that 98 per cent on a national survey felt that the presence of erotic material was not a major national problem when viewed in consonance with the problems of drugs, war, etc. (T. 346, 370, 380). He felt that all the material in question was all right because it would satisfy fantasies and had entertainment and curiosity satisfaction values which he felt were redeeming social values (T. 347-348, 357, 362, 366). He admitted that he was being paid for testifying and that he had testified previously in six prosecutions of obscene materials, and had always testified on behalf of the defendant (T. 353-356). Dr. Doud agreed that the

books were over-done and were sometimes vulgar and in bad taste (T. 383).

The Reverend Carl Esewein was the minister of the Norfolk Unitarian Church and had been in Norfolk for a period of six years (T. 386-389). He had had extensive discussions with people in Norfolk regarding the questions of pornography and obscenity and he felt that the items in question did not appeal to prurient interests, but merely satisfied curiosity (T. 388, 390, 398-401). He felt that all of the items had redeeming social values, but he had never seen any films or books that were without redeeming social values (T. 402-404). He did testify, however, that as to the contemporary community standards tests, these items were pretty much on the borderline and were perhaps 50-50 (T. 402). The defense further attempted to qualify an additional expert witness but the trial judge would not let him qualify (T. 405-416). Reverend David L. Cook was minister of the Bayview United Church of Christ in Norfolk and had been in Norfolk since February 1, 1970, which was about 16 months prior to the trial (T. 422-423). He had been involved in wide discussions relating to obscenity but most of these discussions had been with people from the Ocean View Area of Norfolk and none of them were of the Negro race (T. 424, 428, 432-433). He felt that the exhibits were all right and were entertaining, especially for those with sexual taboos (T. 435-442). On cross-examination he admitted that he had never seen any pictorial material that he thought was obscene, although he had attended the meeting of the Police-Community Relations Board in February of 1971 and at that time viewed the same materials and filled out a questionnaire indicating that he felt the items were obscene (T. 442, 448-449, 451). He agreed that the Police-Community Relations Board was set up on a precinct-by-precinct basis and included a couple of hun-

dred people from all walks of life in Norfolk (T. 458-459).

The case was tried before a jury and the jury was extensively and exhaustively instructed by the trial judge and, after deliberation, found the defendant guilty and sentenced him to pay a $5,000 fine. A motion to set aside the verdict of the jury was argued and overruled by the judge of the Corporation Court of the City of Norfolk on November 23, 1971. On July 11, 1972, the Supreme Court of Virginia denied and refused a Writ of Error on the ground that the Court believed "that there is no reversible error in the judgment complained of."

The petitioner filed a Petition for Writ of Certiorari to the Supreme Court of Virginia's judgment and, by order of June 25, 1973, this Honorable Court granted the Writ of Certiorari, vacated the judgment of the Supreme Court of Virginia and remanded the case for further consideration in light of several decisions rendered that same date. The Supreme Court of Virginia reconsidered its prior decision and, by order of March 4, 1974, reaffirmed its prior determination affirming the judgment of the Circuit Court of the City of Norfolk of November 23, 1971. This Petition for a Writ of Certiorari followed.

## ARGUMENT

### I.

**The Virginia Obscenity Statutes Involved In The Prosecutions Herein, As Construed By The Supreme Court of Virginia, Both Prior To The Instant Case And In The Case of Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798 (1974), Are Both Facially Constitutional And As Applied To The Materials Depicting Or Describing Sexual Conduct As In This Case.**

The two critical Virginia statutes involved in this matter are §§ 18.1-227 and 18.1-228 of the Code of Virginia

(1950), as amended. Those two sections are set forth below in their entirety for the convenience of the Court:

> § 18.1-227. *"Obscene" defined.*—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.
>
> § 18.1-228. *Production, publication, sale, possession, etc., of obscene items.*—Every person who knowingly:
>
> (1) Prepares any obscene item for the purposes of sale or distribution; or
>
> (2) Prints, copies, manufactures, produces, or reproduces any obscene item for purposes of sale or distribution; or
>
> (3) Publishes, sells, rents, lends, transports in intrastate commerce, or distributes or exhibits any obscene item, or offers to do any of these things; or
>
> (4) Has in his possession with intent to sell, rent, lend, transport, or distribute any obscene item, shall be guilty of a misdemeanor. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.
>
> For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another.

In the initial decision in *Price* v. *Commonwealth*, 213 Va. 113, 189 S.E.2d 324 (1972), the Supreme Court of Virginia described the obscenity test to be utilized in Virginia in the following terms:

"As more recent decisions of the Supreme Court have reflected divergent opinions which failed to gain majority approval we have felt constrained to follow the definition of obscenity set forth in *Roth*, 354 U.S. at 489, 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' *Roth* has been reaffirmed in *United States* v. *Reidel*, 402 U.S. 351 (1971). We have also acquiesced in the following amplification of the *Roth* definition set forth in a plurality opinion in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'* v. *Massachusetts*, 383 U.S. 413, 418 (1966):

> ". . .[T]hree elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

*House* v. *Commonwealth*, 210 Va. 121, 125, 169 S.E. 2d 572, 575 (1969). See *Hearn* v. *Short*, 327 F. Supp. 33, 36 (S.D. Tex. 1971) (Concurring opinion of Bue, J.)." (213 Va. at 115).

This exposition of the test for obscenity in Virginia in the *House* and *Price* cases amounts to a judicial construction of the definition of obscenity contained in § 18.1-227 of the Code of Virginia (1950), as amended, so as to preserve the constitutional viability of that Statute (See *Grove Press Inc.* v. *Evans*, 306 F. Supp 1084, 1086 (E.D. Va. 1969)). It is unquestioned that up until the decisions of this Honorable Court in June of 1973, this was the test for obscenity approved by Your Honors. The essential question then becomes whether the decisions in *Miller* v. *California*, 413

U.S. 15 (1973); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973); *Kaplan* v. *California*, 413 U.S. 115 (1973); *United States* v. *12 200-Ft. Reels of Super 8-mm. Film*, 413 U.S. 123 (1973); *United States* v. *Orito*, 413 U.S. 139 (1973); *Heller* v. *New York*, 413 U.S. 483 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Alexander* v. *Virginia*, 413 U.S. 836 (1973), so drastically changed the state of the law as to make the test applied to this case in the Corporation Court for the City of Norfolk, Virginia, constitutionally deficient.

It may be useful at this point to quote a lengthy portion of Chief Justice Burger's opinion for this Court in *Miller*, *supra*, to set forth the parameters of valid constitutional enforcement of obscenity laws:

> "The basic guidelines for the trier of fact must be: *(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois* v. *Wisconsin, supra*, 408 U.S., at 230, 33 L.Ed.2d 312 (1972), quoting *Roth* v. *United States, supra*, 354 U.S., at 489, 1 L.Ed.2d 1498 (1957), *(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law*, and *(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.* We do not adopt as a constitutional standard the '*utterly* without redeeming social value' test of *Memoirs* v. *Massachusetts, supra*, 383 U.S., at 419, 16 L.Ed.2d 1 (1966); that concept has never commanded the adherence of more than three Justices at one time. . . . If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary [citations omitted].

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, supra:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection. [citations omitted] ...." (413 U.S. at .....; emphasis supplied.)

It is evident that the tests newly articulated by Your Honors in *Miller* differ from the tests described by the Supreme Court of Virginia in the *House* case and in its initial decision in the *Price* case in only two respects. The first of these is a substitution of the terminology as to whether the work, "taken as a whole, lacks seriously literary, artistic, political or scientific value" as opposed to the standard described by the Supreme Court of Virginia as a plurality determination in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'* v. *Massachusetts*, 383 U.S. 413 (1966), that the work must be "utterly without redeeming social value." This substitution, contrary to the argument made by petitioner in this proceeding, is not of constitutional dimensions. In

*Miller,* Your Honors did not hold the "utterly without redeeming social value" test to be unconstitutional but you merely recognized the obvious fact that it was practicably unworkable, and a more rational test was substituted therefor. The new test is far less restrictive than the earlier *Memoirs* tests and imposes a lighter burden on the prosecution. The second change made by Your Honors in *Miller* was to explicitly limit the application of these tests to materials which depict or describe "in a patently offensive way, sexual conduct specifically defined by the applicable state law." The second alteration is not actually a change in the test but is merely a clearer delineation of the type of materials to which the test may be applied.

Applying the *Miller* standards to the instant case, it is clear, first, that the materials in this case are clearly lacking in "serious literary, artistic, political, or scientific value" since the jury in the Corporation Court for the City of Norfolk and the Supreme Court of Virginia have found that the materials were "utterly without redeeming social value," a much harsher standard. Secondly, did the materials in question in this case depict or describe "in a patently offensive way, sexual conduct"? The Supreme Court of Virginia in its action on remand by this Honorable Court obviously resolved that question against the petitioner herein.

The only remaining question, then, is whether the Supreme Court of Virginia properly applied the *Miller* tests, if in fact they were substantially new tests, to this conviction which preceded the *Miller* decision. First, as previously pointed out, the only newness in the test is a change regarding the social value of the materials in question and that change is to the detriment of the petitioner here. The judgment affirmed by the Supreme Court of Virginia in its

initial decision was predicated on a test that created a much more extensive burden for the Commonwealth than does the *Miller* test with regard to "social values." Thus, this petitioner had the benefit of a more restrictive test and has no standing to complain with regard to this change (See *Price* v. *Commonwealth, supra,* 214 Va. at 494. The other variation was not in the test but in the description of the materials to which the tests could be constitutionally applied and the Supreme Court of Virginia obviously in its second decision considered the materials herein in light of the *Miller* test.

In addition, the recent decision of this Honorable Court in *Hamling* v. *United States,* ..... U.S. ....., 15 Cr.L. Rptr. 3239 (1974), clearly renders any argument regarding the constitutionality of Virginia statute frivolous because the Federal statute, 18 U.S.C. § 1461, involved in that case was not nearly as specific as §§ 18.1-227 and 18.1-228 of the Code of Virginia. Consequently, the statutes involved in this case are constitutional on their face and are additionally constitutional as applied to the materials involved herein.

## II.

**The Materials Involved In The Instant Case Are Clearly Obscene As a Matter Of Law And As A Matter Of Fact And The Jury And The Courts Below Were Clearly Correct In Their Conclusions To That Effect.**

The cases relied on by petitioner in the instant Petition for a Writ of Certiorari were all decided prior to the decision of this Court in *Miller* v. *California, supra,* and the other decisions decided at the same time and the cases cited in the Petition for a Writ of Certiorari have diminished value as precedents, if indeed they have any value whatsoever. In addition, a review of the materials herein in light of the

recent decision of this Court in *Jenkins* v. *Georgia*, ..... U.S. ....., 15 Cr.L.Rptr. 3259 (1974), will also result in the conclusion that the materials are obscene as a matter of law and as a matter of fact.

## III.

**The Petitioner Does Not Demonstrate In What Regard The Arrest Warrants Were Fatally Defective Where There Is No Claim Made In The Petition For A Writ Of Certiorari That The Instructions Given To The Jury Were Inadequate Or That The Petitioner Was Not Advised As To The Nature Of The Charges Against Him Or Which Specific Obscene Items He Was Charged With Selling.**

The arrest warrant in question is set forth in its entirety at Appendix A. 1 to the Petition for a Writ of Certiorari and it states that the accused "did unlawfully Vio. Sec. 18.1-228 of the State Code of Virginia as amended to-wit; Sale and possession with the intent to sell obscene items." Section 18.1-228 of the Code clearly requires proof of scienter as it states that the prohibited acts in question must be done "knowingly." It is clear under Virginia law that an arrest warrant need not be as specific as an indictment, and it is sufficient if it fairly informs the defendant as to what allegation he must be prepared to meet in the preparation of his defense. There was certainly no question here that the petitioner knew what he was being charged with, and what items he was charged with having sold. As a matter of fact, the defense witnesses at trial all had an opportunity to view and read the items in their entirety prior to trial. The arrest warrant generally is phrased within the terminology of the statute and the petitioner here need only have referred to the statute, as he obviously did, to determine the precise nature of the offense. Counsel for the defendant admitted early in the case that he had been sup-

plied all the specifics of the charge (T. 42-43). In addition, the petitioner does not here raise any questions regarding the adequacy of the instructions that were given to the jury and these allegations are clearly without merit, if not indeed frivolous.

## IV.

**The Supreme Court Of Virginia Properly Has Ruled That The Appropriate Community Standard To Be Applied In An Obscenity Case Is A Local Community Standard As Opposed To A State-Wide Or National Community Standard.**

In its initial decision in the case of *Price* v. *Commonwealth, supra*, the Supreme Court of Virginia made the following statement:

> "Price's assignment of error to the lower court's ruling that the contemporary standard in issue was that of the local community rather than that of the national or state-wide community has been resolved against him by *Alexander* v. *Commonwealth*, 212 Va. 554, 186 S.E.2d 43 (1972). There, noting that the Supreme Court had not been able to agree on a definition of the community by whose standards obscenity should be measured, we approved the local community standard" (213 Va. at 115)

Upon the remand of the *Price* case, the Supreme Court of Virginia again considered the contention that the community was a national or state-wide community and the Court reiterated its prior view in the following terms:

> "*Miller* and *Paris Adult Theatre I* support our holding in *Price*, following *Alexander* v. *Commonwealth*, 212 Va. 554, 186 S.E.2d 43 (1972), that the community standard to be applied is that of the locality rather than that of the state or nation. Although *Miller* had no occasion to consider whether the use of local

standards was constitutionally permissible, it held that national standards were not constitutionally required and that state standards were constitutionally acceptable. In reaching this result the court noted that the diversity of our nation would prevent the effective formulation of a national standard of obscenity. 413 U.S. at 30. The court also relied on the Anglo-American tradition of allowing lay jurors to draw upon the standards of their community. *Id.*

The reasons given in *Miller* for holding that national standards are not constitutionally required in obscenity cases compel the same conclusion with respect to statewide standards. It would be difficult, if not impossible, for a Virginia jury to formulate a statewide standard of obscenity, for our state comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities. Moreover, Virginia juries have traditionally relied on local rather than statewide community standards. *See, e.g., Easterling* v. *Walton*, 208 Va. 214, 218, 156 S.E.2d 787, 790 (1967), which restated the rule that a jury must apply local community standards in medical malpractice cases.

In *Paris Adult Theatre I* the Supreme Court rejected the contention that expert evidence of obscenity is required when the motion picture or other material is placed in evidence, 413 U.S. at 56, a ruling that we had anticipated in *Price*. This ruling reinforces our conclusion that local community standards may be applied, for expert testimony would be required to establish statewide standards. *See Miller*, 413 U.S. at 31." (214 Va. at 491-492).

As the Supreme Court of Virginia stated, the decision of this Honorable Court in *Miller* would appear to support the Supreme Court of Virginia's contention when Your Honors stated the following:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." (413 U.S. at ....).

Your Honors also appear to approve a local community standard when you recognized that "[t]he adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions has historically permitted triers-of-fact to draw on the standards of their community. . . ." (413 U.S. at .....). This language would clearly appear to approve a local standard and it's respectfully submitted that the Supreme Court of Virginia's description of the appropriate community is correct.

Any question regarding the correctness of the Virginia Supreme Court's view regarding the application of a local community standard as opposed to a statewide or national community standard has been resolved by the recent decisions of this Honorable Court in *Hamling* v. *United States, supra*, and *Jenkins* v. *Georgia, supra*. In the *Hamling* case your Honors held the following:

> "We think that both of these contentions evidence a misunderstanding of our *Miller* holdings. *Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as 'hypothetical and unascertainable,' 413 U.S., at 31. But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of 'the average person, applying contemporary community standards.' 413 U.S., at 24. When this approach is coupled with the reaffirmation in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56

(1973), of the rule that the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials, the import of the quoted language from *Miller* becomes clear. *A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. Stone* v. *New York, Chicago & St. Louis R. Co.*, 344 U.S. 407, 409 (1953); *Schultz* v. *Pennsylvania R. Co.*, 350 U.S. 523, 525-526 (1956). Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law.

Our analysis in *Miller* of the difficulty in formulating uniform national standards of obscenity, and our emphasis on the ability of the juror to ascertain the sense of the 'average person, applying contemporary community standards' without the benefit of expert evidence, clearly indicates that 18 U.S.C. § 1461 is not to be interpreted as requiring proof of the uniform national standards which were criticized in *Miller*. In *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973), a federal obscenity case decided with *Miller*, we said:

> 'We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller* v. *California*, *ante*, at 23-25. These standards are applicable to federal legislation.' *Id.*, at 129-130.

Included in the pages referred to in *Miller* is the standard of 'the average person, applying contemporary community standards.' In view of our holding in *12 200-ft. Reels of Film*, we hold that 18 U.S.C. § 1461 incorporates this test in defining obscenity.

> The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is *to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case.* Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw. But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jury in the resolution of the issues which they were to decide." (15 Cr.L.Rptr. at 3244; emphasis supplied).

Your Honors were even more specific in the *Jenkins* case in the following lanugage:

> "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply 'national standards.' We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.' *Miller held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards,* and the States have considerable latitude in framing statutes under this element of the *Miller* decision.

> A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*." (15 Cr.L.Rptr. at 3260; emphasis supplied).

Consequently, the Virginia Supreme Court quite properly ruled that the appropriate community standards could be the standards of the local community, which was the community from which the jury was drawn.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 28th day of August, 1974, I mailed three copies of the

foregoing brief for the respondent in opposition to the granting of a petition for a writ of certiorari to Robert S. Cohen, Esquire and Samuel Goldblatt, Esquire, Suite 804, One Main Plaza East, Norfolk, Virginia 23510, counsel of record for petitioner.

ROBERT E. SHEPHERD, JR.
*Assistant Attorney General*